STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

BOARD OF EDUCATION OF THE
NORWAY-VULCAN AREA SCHOOLS,

Appellant,

vs.

SUSAN KORRI,

Appellee.

Case No. 125691

Court of Appeals
Case No. 238811

State Tenure Commission
Docket No. 01-6

125691

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APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PENDING APPLICATION FOR LEAVE TO APPEAL

*** * *ORAL ARGUMENT REQUESTED* * ***

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The State Tenure Commission answered, "Yes."

The Court of Appeals answered, "Yes."

Appellant answers, "No."

Appellee answers, "Yes."

II. **WHETHER APPELLANT BOARD'S OBLIGATION TO ISSUE A YEAR-END EVALUATION UNDER MCL 38.83a(1) IS EXCUSED BY THE FACT THAT MS. KORRI WAS NOTIFIED THAT HER EMPLOYMENT WAS TERMINATED PURSUANT TO MCL 38.83.**

The State Tenure Commission did not answer this particular question.

The Court of Appeals did not answer this particular question.

Appellant answers, "Yes."

Appellee answers, "No."

INTRODUCTION

On March 29, 2002, the Michigan Court of Appeals granted Leave to Appeal for Appellant, Norway-Vulcan Area Schools Board of Education. Their appeal involved the State Tenure Commission's interpretation of Section 3a(1) of Article II of the Teacher Tenure Act, MCL 38.83a(1).

On February 10, 2004, the Court of Appeals affirmed the Decision and Order of the State Tenure Commission (hereinafter referred to as the "Commission"). Appellant Board filed its Application for Leave to Appeal with this Court. In an Order dated March 11, 2005, this Court directed its Clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). Pursuant to the Order, the parties were allowed to file Supplemental Briefs.

Appellee, Susan Korri, asserts the Commission correctly determined that Appellant Board's action did not comply with the requirements of the Teacher Tenure Act. The Decision and Order of the Commission, that a mid-year evaluation provided in January, in the middle of the school year, does not constitute an "annual year-end performance evaluation" within the meaning of Section 3a(1) of Article II is a correct interpretation of the Act's requirements.

Ms. Korri now files her Supplemental Brief in Opposition to Appellant's Application for Leave to Appeal, and states that the Court of Appeals' Decision affirming the Decision and Order of the Commission should also be affirmed.

COUNTER-STATEMENT OF MATERIAL FACTS

Appellee, Susan Korri, graduated from Northern Michigan University and was certified to teach physical education and business administration. (Transcript of the

July 25, 2001 hearing before State Tenure Commission Administrative Law Judge Berga, hereinafter "Tr," p 69.) After graduating from college, Ms. Korri began teaching at Ewen-Trout Creek. (Tr, p 69.) By teaching in Ewen-Trout Creek for three years (1976, 1977, and 1978) Ms. Korri obtained tenure with Ewen-Trout Creek. (Tr, pp 69-70.)

Ms. Korri resigned from Ewen-Trout Creek and entered the military. After serving in the military, and later in the Austin, Texas Police Department, Ms. Korri returned to teaching with the El Paso, Texas schools. (Tr, pp 70-71.) Ms. Korri taught in El Paso for 12 years before deciding to return home to the Upper Peninsula. (Tr, p 71.)

Ms. Korri began her teaching career with Appellant Board in 1999. (Tr, p 13.) While employed with Appellant Board, Ms. Korri was assigned to teach physical education and was responsible for students from developmental kindergarten (DK) to high school. (Tr, p 72.) While she taught for Appellant Board, Ms. Korri was supervised by three administrators, depending on the grade level of the student – Bertha Hommer at the elementary school level, Andy Hongisto at the middle school level, and Don Byczek at the high school level. (Tr, pp 73, 94.) In her first year at Norway-Vulcan, Principal Hommer did three evaluations of Ms. Korri. (Tr, p 73.) The other two principals, Hongisto and Byczek, did informal "walk-throughs" of her class. (Tr, p 73.)

In her first year with Appellant Board, Ms. Korri was provided a form entitled "Individual Development Plan" (IDP) (Joint Exhibit 10 of the exhibits received at the July 21, 2001 hearing before State Tenure Commission Administrative Law Judge Berga, hereinafter "Joint Exhibit __"), which she believed to be a "goal sheet." Ms. Korri's understanding of this goal sheet was that she was to write out her goals for the year. All teachers, probationary and tenured, were required to fill out this form. (Tr, pp 74, 97.)

In her second year of employment, 2000-2001, Ms. Korri was evaluated on November 3, 2000, after three observations. (Joint Exhibit 1.) In early December 2000, Ms. Korri and Ms. Hommer agreed on her goals for the 2000-2001 school year. (Joint Exhibit 5.) Those agreed-upon goals constituted only part of the first page of Joint Exhibit 5. The writing on the second page, along with the paragraph entitled "Administrative Support" on the bottom of the first page of Joint Exhibit 5 were unilaterally placed on the document by Principal Hommer after the end of the school year. (Tr, pp 50, 63.)

Principal Hommer again evaluated Ms. Korri (after three observations) on January 23, 2001. (Joint Exhibit 6.) Ms. Korri was advised by Principal Hommer that because she was in the position to obtain tenure at the end of the year, Principal Hongisto would do her last observation. (Tr, p 85.) Both Principal Hongisto and Principal Hommer confirmed he was to do Ms. Korri's final evaluation. (Tr, pp 61, 86.)

Principal Hongisto did observe Ms. Korri's classroom in March, on the last day before the recommendations for tenure were to be made, but put nothing in writing. (Tr, p 93.) *Principal Hommer did not observe or evaluate Ms. Korri after providing her the January 23, 2001 evaluation.* (Tr, p 62.)

On March 12, 2001, Appellant Board voted to not grant tenure status to Ms. Korri and non-renewed her employment. (Joint Exhibit 7.) A copy of Appellant Board's resolution and the Teacher Tenure Act were mailed to Ms. Korri on April 23, 2001, (Joint Exhibit 8) and hand delivered to her on April 26, 2001. (Joint Exhibit 9.) Ms. Korri subsequently filed a Claim of Appeal with the Commission.

A hearing was held in Norway on July 25, 2001, before the Commission's Administrative Law Judge Tessema Berga. On October 17, 2001, Administrative Law Judge Berga issued his Preliminary Decision and Order dismissing Ms. Korri's Claim of Appeal.

Ms. Korri timely filed Exceptions to the Preliminary Decision and Order with the Commission. On December 19, 2001, the Commission reversed the Administrative Law Judge and concluded the January 23, 2001 evaluation was not "an annual year-end performance evaluation" within the meaning of Section 3a(1) of Article II of the Teacher Tenure Act, and ordered Appellant Board to reinstate Ms. Korri.

Upon application, the Court of Appeals reviewed the Commission's Decision. In an Opinion dated, February 10, 2004, the Court of Appeals affirmed the Commission.

Ms. Korri asserts the Commission and the Court of Appeals have correctly interpreted the Teacher Tenure Act and requests this Court **affirm** their decisions. Accordingly, Appellant Board's Application for Leave to Appeal must be denied.

COUNTER-STATEMENT OF STANDARD OF REVIEW

This Court has long recognized that the construction given a statute by the agency charged with the duty of administering it is entitled to deference. Tomiak v Hamtramck School Dist, 426 Mich 678, 690; 397 NW2d 770 (1986); Magreta v Ambassador Steel Co (On Rehearing), 380 Mich 513, 519; 158 NW2d 473 (1968).

Further, this Court has recognized that judicial review of the Commission's findings is limited to whether there was competent, material, and substantial evidence received by the Commission to support its findings. Ferrario v Escanaba Bd of Ed, 426 Mich 353, 366-367; 395 NW2d 195 (1986). Under these standards, there are no

cogent reasons for reversing the Commission's Decision, as it was supported by competent, material, and substantial evidence.

Finally, the grounds for granting applications for leave to appeal to this Court are set forth in MCR 7.302(B). Ms. Korri asserts that, for the reasons stated below, this Court should deny the Board's Application for Leave to Appeal.

ARGUMENT

I. THE TENURE COMMISSION AND THE COURT OF APPEALS PROPERLY HELD THAT APPELLANT BOARD FAILED TO PROVIDE AN ANNUAL YEAR-END PERFORMANCE EVALUATION WITHIN THE MEANING OF MCL 38.83a(1).

This Court asked the parties to pay particular attention to two issues in addressing the instant Application for Leave to Appeal. The first issue, which Ms. Korri asserts is central to this case, is whether or not Appellant Board's non-renewal of Ms. Korri violated Section 3a(1) of Article II of the Teacher Tenure Act. Ms. Korri asserts the Commission and Court of Appeals have correctly interpreted the statute and that leave should be denied by this Court.

The Decision of the Commission is a correct interpretation of Section 3a of Article II of the Teacher Tenure Act. Under Section 3a:

> (1) If a probationary teacher is employed by a school district for at least 1 full school year, the controlling board of the probationary teacher's employing school district shall ensure that the teacher is provided with an individualized development plan developed by appropriate administrative personnel in consultation with the individual teacher and that the teacher is provided with at least **an annual year-end performance evaluation** each year during the teacher's probationary period. **The annual year-end performance evaluation** shall be based on, but is not limited to, at least 2 classroom observations held at least 60 days apart, unless a shorter interval between

the 2 classroom observations is mutually agreed upon by the teacher and the administration, and **shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan.** This subsection does not prevent a collective bargaining agreement between the controlling board and the teacher's bargaining representative under Act No. 336 of the Public Acts of 1947, being sections 423.201 to 423.216 of the Michigan Compiled Laws, from providing for more performance evaluations or classroom observations in addition to those required under this subsection. Except as specifically stated in this subsection, this section does not require a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.

(2) Failure of a school district to comply with subsection (1) with respect to an individual teacher in a particular school year is conclusive evidence that the teacher's performance for that school year was satisfactory.

MCL 38.83a. (Emphasis added.)

In the instant case, the Commission and Court of Appeals both correctly determined that Ms. Korri did not receive an "annual *year-end* performance evaluation" which included an "assessment of [her] progress in meeting the goals of . . . her individualized development plan."

A. A review of the Tenure Act's requirements with regard to evaluations and probationary teachers.

One of the primary purposes of the Teacher Tenure Act is to protect teachers from arbitrary and capricious employment practices of school boards. Tomiak, *supra*, at 687. The Legislature's dedication to this purpose was revealed through its adoption of Section 3a of Article II of the Teacher Tenure Act, MCL 38.83a. Section 3a was part of a

package of bills which were adopted in 1993 as amendments to the Teacher Tenure Act.[1] This Section created certain procedural protections for probationary teachers, while expanding the probationary period for teachers from two years to four years.[2] The procedural requirements of Section 3a of Article II, however, are no different for teachers at the end of their fourth year of probation than the requirements for teachers who previously had tenure in a Michigan school district who are at the end of their second year of probation.

The obligations of a school district to a probationary teacher under Section 3a of Article II are as follows:

> (i) The school district has an obligation to provide each probationary teacher with an individualized development plan in each of the years of the probationary period, with the exception of the teacher's first year. *See, e.g.*, VanGessel v Lakewood Public Schools, 220 Mich App 37; 558 NW2d 248 (1997).
>
> (ii) The individualized development plan must be developed by appropriate administrators in consultation with the teacher.
>
> (iii) The school district must provide the teacher with at least an annual year-end performance evaluation.
>
> (iv) The annual year-end performance evaluation must be based on at least two classroom observations held at least 60 days apart.
>
> (v) The annual year-end performance evaluation must include at least an assessment of the teacher's

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[1]The two bills were 1993 PA 59 and 1993 PA 60.

[2]In Ms. Korri's situation, as she had previously obtained tenure in a Michigan school district, she was obligated only to serve a two-year period of probation. MCL 38.92.

progress in meeting the goals of his or her individualized development plan.

(vi) The teacher must be advised by May 1 in writing as to whether his or her service is deemed unsatisfactory. MCL 38.83.[3]

(vii) The failure of the school district to comply with MCL 38.83a(1) is conclusive evidence of satisfactory service.

All of these procedural protections, except the requirement that written notice of unsatisfactory service be provided at least 60 days before the end of the school year, came into existence with the 1993 amendments to the Act.

The practical implications of these protections are apparent. School boards must now comply with objective safeguards before making a subjective decision on a probationary teacher's performance. These requirements protect against arbitrary and capricious decisions by school boards to non-renew probationary teachers. They provide probationary teachers with an objective review procedure, and, in doing so, prevent school boards from making uninformed decisions on those teachers' qualifications. In exchange for those protections, the Legislature extended the probationary period from two to four years.

B. The decision of the Commission does not impose additional, nor unauthorized, requirements on school boards.

Appellant Board asserts the Decision and Order of the Commission impermissibly imposes requirements on school boards which are not otherwise expressly

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[3]MCL 38.83 specifically provides the notice must be given 60 days before the end of the school year. However, the end of the school year has been determined to be June 30. *See*, Ajluni v Bd of Ed of the West Bloomfield School Dist, 397 Mich 462, 465; 245 NW2d 49 (1976). May 1 is 60 days before June 30.

authorized by the Teacher Tenure Act. Appellant Board's claims in that regard are without merit.

1. The Commission was authorized to interpret the language of Section 3a.

The Commission's jurisdiction in the present case is unquestionable. This Court recognized the Commission's authority to decide questions concerning probationary teachers' tenure status in Lipka v Brown City Community Schools, 403 Mich 554; 271 NW2d 771 (1978). There, this Court recognized the following:

> If a teacher claims tenure as a result of satisfactory completion of probation, the determination of timeliness or legal effect of a notice of unsatisfactory work is always within the jurisdiction of the Tenure Commission.

Id, at 560.

Likewise, the controversy proffered in the present case fell within the purview of the Commission's jurisdiction. Ms. Korri claimed that Appellant Board failed to comply with the notice requirements of Section 3a(1). Pursuant to Section 3a(2), this failure constituted conclusive evidence that her performance for that school year was satisfactory. As a result, the Commission was authorized to determine the timeliness or legal effect of Appellant Board's notice of unsatisfactory performance, or lack thereof, as that determination resolved the question of whether Ms. Korri would attain tenure.

2. The Commission's interpretation does not mandate a "particular method" for conducting performance evaluations.

Appellant Board claims the Commission's conclusion that the "annual year-end performance evaluation must be prepared within a reasonable time coordinating with the May 1 deadline" (Decision and Order, pp 14-15) is contrary to the Act's

specification that it "does not require a particular method for conducting a performance evaluation." MCL 38.83a(1). In essence, Appellant Board is asserting that the Commission's determination of the appropriate timing of a statutorily-mandated "annual year-end performance evaluation" constitutes a requirement as to a school board's "particular method for conducting a performance evaluation." This is not so. Appellant Board could utilize any method it chose to evaluate Ms. Korri – it simply had to exercise that evaluative authority within the timelines set forth in the Act.

Appellant Board's claim that the Commission is amending the Teacher Tenure Act is erroneous. Ms. Korri acknowledges that Section 3a(1) of Article II does not require a particular *method* for conducting the performance evaluation. However, while the Act is silent as to the definition, "method" is defined in the dictionary as "a procedure or process for attaining an object; a systematic procedure, technique, or mode of inquiry employed by or proper to a particular discipline or art." *Webster's Ninth New Collegiate Dictionary* (1990), p 747.

In this context, the Commission's determination that "the annual year-end performance evaluation should occur within a reasonable time frame of the May 1 unsatisfactory notice deadline" (Decision and Order, p 13) *does not* dictate the *method*, procedure, or system by which school boards are to conduct the "annual year-end performance evaluation." Rather, the Commission's Decision clarifies the *timing* of such evaluations.

In that capacity, the Commission's Decision properly satisfies its statutory obligation to interpret the Teacher Tenure Act. The Decision was not a misguided legislative act, as argued by Appellant Board. The Commission's Decision is the vehicle by

which life is given to the language of Section 3a of Article II of the Teacher Tenure Act. The Decision acknowledges that Section 3a(1) of Article II requires an "*annual year-end performance evaluation*," and interprets when such is to occur.

As a result, the Commission clearly acted within its purview. The Decision gives meaning to the statutory requirement of "year-end" performance evaluations, and does not tell the school board *how* to perform evaluations. This distinction, which the Commission clearly saw, does not exalt form over substance. Nor is it contrary to the language expressed within the Act. Instead, the Decision adopts the only rationale which could give meaning to *every* word and phrase adopted by the Legislature in 1993.

3. "Year-end" was intentionally added to Section 3a(1) and must be given legal effect.

In interpreting statutes, it has long been held that the statute should be interpreted in a way which provides meaning to each and every word in the statute, to the extent possible. For example, in Altman v Meridian Twp, 439 Mich 623, 635; 487 NW2d 155 (1992), this Court determined that in construing a statute, the court should presume that every word has some meaning and should avoid any construction that would render a statute, or any part of it, surplusage or nugatory. *See also*, Melia v Employment Security Comm, 346 Mich 544, 562; 78 NW2d 273 (1956). Further, this Court has stated that as far as possible, effect should be given to every phrase, clause, and word of a statute. Gebhardt v O'Rourke, 444 Mich 535, 542; 510 NW2d 900 (1994). In interpreting the express language of the Act, the Commission ensured that no phrase, clause or word was rendered nugatory. The inclusion of the phrase "year-end" has legal significance, and the Commission determined exactly what that language requires.

While Ms. Korri asserts the language of the Act is clear and should be enforced as written, where an ambiguity exists in a statute, a court may refer to the history of the legislation in order to determine the underlying intent of the Legislature. Luttrell v Dep't of Corrections, 421 Mich 93, 103; 365 NW2d 74 (1984). "In order to ascertain and give effect to legislative intent, the changes in the act must be construed in light of preceding statutes and the historical legal development of the statute" Indenbaum v Michigan Bd of Medicine, 213 Mich App 263, 272; 539 NW2d 574 (1995). "To ascertain the reasons for an act and the meaning of its provisions, [courts] may look for guidance to the legislative history of the act, as well as to the history of the time during which the act was passed." Frankenmuth Mutual Ins Co v Marlette Homes, Inc, 219 Mich App 165, 171; 555 NW2d 510 (1996), *rev'd on other grounds*, 456 Mich 511; 573 NW2d 611 (1998). In this case, the Commission found the legislative history to be compelling, and Ms. Korri equally concurs.

Section 3a was added to the Teacher Tenure Act as part of 1993 PA 59, which was introduced as House Bill No. 4112 ("HB 4112"). In its finished product, the proposed Bill included the phrase "year-end," which is what brings the parties before this Court. This phrase, however, was not included in the Bill's predecessor, House Bill No. 5357 ("HB 5357"), introduced on December 3, 1991, along with Senate Bill No. 637 ("SB 637"). Both HB 5357 and SB 637 proposed the following language:

> SEC. 1A. (1) DURING A TEACHER'S PROBATIONARY PERIOD UNDER THIS ACT, THE CONTROLLING BOARD OF THE TEACHER'S EMPLOYING SCHOOL DISTRICT SHALL ENSURE THAT THE TEACHER IS PROVIDED WITH AN INDIVIDUALIZED PROFESSIONAL DEVELOPMENT PLAN DEVELOPED BY APPROPRIATE BUILDING-LEVEL ADMINISTRATIVE PERSONNEL AND THE INDIVIDUAL

TEACHER AND WITH AT LEAST **ANNUAL PERFORMANCE EVALUATIONS** CONDUCTED BY APPROPRIATE BUILDING-LEVEL ADMINISTRATIVE PERSONNEL. **EACH ANNUAL PERFORMANCE EVALUATION** SHALL INCLUDE AT LEAST AN ASSESSMENT OF THE TEACHER'S PROGRESS IN MEETING THAT OBJECTIVES OF HIS OR HER INDIVIDUALIZED PROFESSIONAL DEVELOPMENT PLAN AND A REVISION OF THAT PLAN AS APPROPRIATE.

Addendums 1 and 2, pp 3-4. (Emphasis added.)

Noticeably absent from the initial Bills is the phrase "year-end."

Further, two analyses prepared by the House Legislative Analysis Section (February 25, 1993 and July 26, 1993) analyzed HB 4112. Both state, in part:

> House Bill 4112. The bill would:
>
> – extend the probationary period for teachers from two years to four years and require that teachers be provided during the probationary period with individualized professional development plans and with at least **annual, end-of-year performance evaluations**.

Addendums 3 and 4, p 1. (Emphasis added.)

Again, the House Legislative Analysis reinforces both Ms. Korri's position and the Commission's Decision that the phrase "year-end" is significant as to when the annual performance evaluations are to be provided.

The inclusion of the "year-end" language was not accidental. In fact, the above historical development reveals that HB 4112 intentionally modified both of the initial House and Senate Bills to include the phrase "year-end." Rather than leave the language at "annual performance evaluations," as introduced in 1991 in both HB 5357 and SB 637, the Legislature carefully changed Section 3a(1) to require "an annual *year-end* performance evaluation." This was understood within the House Legislative Analysis that

the performance evaluation is to be provided at the "end-of-year." Therefore, the "year-end" language is significant, and the Commission acted within its jurisdiction in determining the extent of its significance.

Regardless of the inclusion of "year-end" in Section 3a(1), Appellant Board repeatedly argues that the Act does not specify a time when "an annual year-end performance evaluation" is to be prepared, completed, and issued to the teacher. However, Appellant Board also repeatedly overlooks the phrase "year-end." By doing so, the interpretation offered by Appellant Board would delete the "year-end" language from the Teacher Tenure Act, thereby making the phrase nugatory.

Appellant Board essentially asks this Court to interpret Section 3a(1) to only require "an annual evaluation," as initially introduced in 1991, while ignoring the significant addition of "year-end" in the finished product. Had the Legislature intended that only one evaluation be required at any time of the school year (after the 60 days between observations have passed), the Legislature would not have inserted the "year-end" language.

Therefore, the Commission acted lawfully by interpreting "year-end" to really mean "year-end." The Commission recognized the significance of the phrase, and properly deciphered its legal meaning.

4. The lack of a more specific date or time within the Act does not automatically grant school boards absolute discretion in determining when "year-end" evaluations are to be provided.

Appellant Board further argues that if the Legislature had intended a specific time, it would have. As explained above, the Legislature already has, through the phrase "year-end." Regardless of Appellant Board's urging, this Court must not spend time

examining what the Legislature did not say, nor question how the Legislature could have otherwise stated its intentions. Instead, Ms. Korri asserts that this Court must concern itself with what the Legislature has already expressed, *i.e.*, the only performance evaluation required of school board's with respect to probationary teachers is "an annual year-end performance evaluation." Appellant Board did not meet this requirement, yet urges this Court to excuse its failure to follow the Act's procedural requirements.

Merely because the Act does not define a more specific date does not mean that the Legislature intended to give school boards absolute discretion as to when the annual year-end performance evaluations were to be provided. Appellant Board submits that the provision cannot be literally construed because it would require an evaluation at the end of the school year, which has been defined as June 30. This argument is misplaced, and is contrary to the rationale behind the very case which established June 30 as the end of the school year.

June 30 is the close of the school year not because that specific date is set forth in the Act, but because of this Court's decision in Ajluni v Bd of Ed of the West Bloomfield School Dist, 397 Mich 462, 465; 245 NW2d 49 (1976). The controversy arose under Section 3 of Article II of the Act, and the principal issue related to whether the employer complied with the 60-day notice provision. At that time, Section 3 required the following:

> At least 60 days before **the close of each school year** the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory: Provided, That failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory, and: Provided further, That any probationary teacher or teacher not on continuing contract

> shall be employed for the ensuing year unless notified at least 60 days before the close of the school year that his services will be discontinued.

Ajluni, 59 Mich App 213, 215, n 1; 229 NW2d 385 (1975). (Emphasis added.)

The sufficiency of the 60-day notice in that case was dependant on the date used as "the close of each school year."

In Ajluni, this Court reversed the Court of Appeals decision that the close of the school year was the last day a teacher is required to perform services. *See,* 59 Mich App 213; 229 NW2d 385 (1975). The closing of school would then determine the termination of the school year in each district. Under the Court of Appeals' rationale, the end of the school year would then have been different from district to district since each school board would have the ability to set the last day on which a teacher was required to perform services. This would presumably change from year-to-year, thereby changing the 60-day deadline from year-to-year.

In reversing the Court of Appeals, this Court in Ajluni agreed with the trial court's determination that the close of the school year is June 30. What is important about this decision is that *nowhere* in the Act does the Legislature expressly state that the close of the school year is June 30. That date was the result of judicial interpretation of the meaning of "the close of each school year." In arriving at the June 30 date, the Ajluni Court made the following conclusions:

> The trial court's decision to consider the close of the school year as June 30 provides the best result in construing the teacher tenure act as a whole. The trial court based its decision on MCLA § 340.353; MSA §15.3353, which states that the school year of all districts shall commence on the first day of July. Although this does not compel as a matter of law that the last day of the school year is June 30, such a

> conclusion is reasonable and supported in common sense. It also has the salutary effect of providing certainty to all parties every year of the date by which notice must be given. Under the Court of Appeals interpretation, this certainty is not available.

Ajluni, 397 Mich at 465.

A comparison of the Court's decision in Ajluni to the present case is compelling. Like Ajluni, this case deals with an "ambiguous" time reference in the Act, wherein the Legislature specified a period of time, but not a specific date. Just as the Supreme Court interpreted the close of the school year to be June 30, the Tenure Commission interpreted when annual year-end evaluations are to occur. Both referred to other statutory provisions to justify their interpretations, *i.e.*, the Supreme Court referred to the provision marking the beginning of the school year, while the Commission referred to the 60-day notice provision in Section 3 to determine that "year-end" as used in Section 3a requires that "the annual year-end performance evaluation should occur within a reasonable time frame of the May 1 unsatisfactory notice deadline to be in compliance with the statute's year-end mandate." (Decision and Order, p 13.)

Further, both decisions bring certainty to the probationary process. As stated in Ajluni, the judicially-defined close of the school year is "reasonable and supported in common sense," and "has the salutary effect of providing certainty to all parties every year of the date by which notice must be given." While Appellant Board may disagree, the Commission's present decision brings more certainty to the evaluation process than the alternative suggested by Appellant Board.

Under Appellant Board's suggested interpretation of Section 3a(1), a school board could issue "year-end" evaluations at any time during the school year, so long as it has already conducted two observations which were at least 60 days apart. Appellant Board even theorizes that it could observe a probationary teacher in September and again in December, and then immediately provide the teacher with a "year-end" performance evaluation. (Application for Leave to Appeal, p 15.) Appellant Board conceptually contends that an annual year-end evaluation can occur anytime between the 61st day of classes (after the two required observations) and May 1 (the deadline for providing notice of unsatisfactory performance). In the present case, Appellant Board argues that the January 23, 2001, evaluation satisfied these requirements and was, thus, sufficient to meet their obligation of providing a "year-end" evaluation under Section 3a(1). Ms. Korri asserts that this interpretation provides absolutely no certainty.

Under the Commission's Decision, however, the expectations of the school board and its probationary teachers are more certain. The "year-end" evaluations are to be provided within a reasonable time of the May 1 notice deadline. In this case, the Commission found that the January 23, 2001, evaluation was not provided within a reasonable time of the May 1 deadline.

In addition, had the Legislature intended to grant school boards absolute discretion to determine *when* the "year-end" evaluations were to occur, it would have expressly conferred this power. The Legislature has expressly given discretion to school boards elsewhere in Section 3a(1). For instance, in the last sentence of Section 3a(1), the Legislature expressly provided school boards with the discretion to determine *how* the evaluation process will be conducted:

> Except as specifically stated in this subsection, this section does not require a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.

MCL 38.83a(1).

Thus, the school boards are expressly provided discretion to determine the *method* used for the evaluation and observation process, limited only where expressly stated in this subsection, Section 3a(1). However, the Legislature has also expressly limited their discretion to determine *when* annual evaluations must occur. This intention was specifically stated when the Legislature included the phrase "year-end" into the evaluation process. Therefore, school boards were not given absolute flexibility to determine when year-end evaluations are to be provided under the Act.

5. Appellant Board's action was contrary to law and, thus, arbitrary, unreasonable, and in bad faith.

Finally, Appellant Board asserts the Commission's Decision is erroneous because the Commission and the courts are to defer to decisions made by school boards and their administrative staff unless their decision is arbitrary, unreasonable, or made in bad faith. Unfortunately, Appellant Board missed one type of decision which the Commission and/or the courts may interfere with – one where the board violates the law, which the court has no obligation to defer to. In this case, the action of Appellant Board did not comply with the law surrounding the evaluation of probationary teachers as set forth in Section 3a(1). Pursuant to Section 3a(2), Appellant Board's failure to comply with the requirements of Section 3a(1) "is conclusive evidence that the teacher's performance for that school year was satisfactory." MCL 38.83a(2). Appellant Board refuses to

acknowledge that Ms. Korri has legally obtained tenure through the operation of Section 3a(2).

It would be absurd to hold that a school board's failure to comply with the Act's requirements is not arbitrary, unreasonable, or made in bad faith. This would encourage future non-compliance by other school boards, perhaps even in other areas of the Act.

Based upon all of the above arguments, the Commission properly interpreted Section 3a(1) of Article II of the Teacher Tenure Act, and *did not* establish any new requirements in doing so. The Act requires more than just an annual performance evaluation to be conducted at some point in the year; it requires a "year-end" evaluation. The Decision of the Commission and the opinion of the Court of Appeals are, therefore, correct and must be affirmed.

C. The Commission's interpretation does not invade the discretionary province of school boards.

Appellant Board asserts the Commission's Decision invades the discretionary province of school boards. In support of its argument, Appellant Board states that school boards are allowed to make "subjective" determinations as to a probationary teacher's performance, and are not required to state reasons for finding a teacher's performance unsatisfactory. These arguments are without merit.

1. The Commission's Decision does not infringe upon the substantive decision-making authority of Appellant Board.

Ms. Korri acknowledges that the probationary period is a "trial period during which a controlling board may make a subjective determination of whether a certain teacher satisfies that district's particular needs and policy." Lipka, *supra*, 558-559.

However, a school board's discretion is *not* unfettered; it is limited by the requirements of the Act. Lipka clearly acknowledges the authority of the Commission to reinstate teachers where the school board failed to fulfill its obligations to probationary teachers under the Act.

The Commission's Decision is *not* an infringement on the substantive decision-making authority of Appellant Board. Rather, the Commission properly determined that a mid-year evaluation did not meet the statutory requirement of a "year-end" evaluation. Since Appellant Board failed to meet the time requirements clearly established in Section 3a(1) of Article II, the Commission had no choice but to reinstate Ms. Korri – Section 3a(2) states that failure to comply with subsection (1) is "conclusive evidence" of satisfactory service. Therefore, the Commission only did what was statutorily required.

2. The Commission's Decision does not require an inquiry into Appellant Board's subjective motives for Ms. Korri's non-renewal.

Having failed to provide a "year-end" evaluation, Appellant Board also raises a "red herring" argument with regard to the determination of a "reasonable time." In essence, Appellant Board argues that determining a reasonable time "depends on the particular facts and circumstances of each case." (Application for Leave to Appeal, p 19.) Appellant Board then insists that this would require inquiring into why the school board issued the annual year-end performance evaluation, and cautions that neither the Commission nor a court should inquire into motives of a school district for finding a teacher's performance unsatisfactory under Lipka, *supra.* This argument is also without merit.

First, for a party who vehemently argues against inquiries into a school board's motives for finding a probationary teacher unsatisfactory, Appellant Board dedicates a large portion of its Brief explaining why it thought Ms. Korri was not satisfactory. Clearly, Appellant Board is attempting to prejudice this Court in hopes of attaining a favorable decision. However, this appeal concerns the timing of year-end evaluations. As such, the Court must focus on the procedural steps taken by Appellant Board, not its subjective beliefs as to Ms. Korri's performance.

Second, Appellant Board's argument is also inconsistent with the subsequent Section "III" of its Brief, wherein it states:

> [T]he reasonableness of the administration's decision to issue Korri's year-end evaluation on January 23, requires consideration of the specific facts supporting that decision – not just an assessment of the number of months that have passed since the beginning of the school year.

Application for Leave to Appeal, pp 21-22. (Footnote omitted.)

Thus, while Appellant Board now claims that no inquiry should be made by the Commission or a court, it argues only a few pages later that consideration of the specific facts of each case is required. This is exactly what the Commission did; it looked at the facts of this case and determined that the mid-year evaluation provided in January did not comply with the requirements of the Act. Yet, the Commission only looked to those facts necessary for making its authorized decision on the timeliness and legal effect of Appellant Board's mid-year evaluation.

Finally, a decision from the Commission on this issue does not require an inquiry into a school board's subjective motives as to why it believes a teacher is unsatisfactory. In her challenge under the Act, Ms. Korri has not challenged the

employer's reasons for non-renewal. Rather, the only inquiry sought of the Commission and this Court is whether Appellant Board followed the proper procedures set forth in the Act in reaching its conclusion. Under Section 3a(1), these procedures require a timely "year-end performance evaluation."

The above distinction was made clear in the present case. Ms. Korri only challenged Appellant Board's failure to follow the procedures set forth in the Act. This is reflected in the Administrative Law Judge's initial decision, wherein the "Issue" was clearly stated as follows:

> Did appellee [Appellant Board] prepare a year-end evaluation of appellant's performance based on at least two observations which were at least 60 days apart?

Preliminary Decision of the Administrative Law Judge, p 3.

Further, the Commission's Decision acknowledges that this was the issue in contention:

> Appellant [Ms. Korri] claims that appellee [Appellant Board] failed to provide her with an annual year-end evaluation which included an assessment of her progress in meeting the goals set forth in her individualized development plan (IDP). Appellant contends this failure to comply with the requirements of §3a(1) of the Teachers' Tenure Act mandates a finding that her performance was satisfactory for that school year pursuant to §3a(2) of the Act. MCL 38.83a; MSA 15.1983(1). Accordingly, appellant argues she acquired tenure with appellee as a matter of law having successfully completed her final year of probation with appellee.

Decision and Order, p 2.

As illustrated, the analysis was focused on the procedural issues, and did not inquire into the reasons for Appellant Board's decision with respect to Ms. Korri.

As a result, the Decision of the Commission does not invade the discretionary province of the school boards. Not only is the Decision supported by the law, but also by

the competent, material, and substantial evidence on the record as a whole. The Court of Appeals' affirmation of the Commission's Decision properly determined the same.

D. The January 23, 2001, "mid-year" evaluation does not meet the Act's "year-end" requirement.

Appellant Board argues that the reasonableness of its decision to issue what it now claims was a "year-end" evaluation to Ms. Korri on January 23, 2001, requires a consideration of the specific facts supporting that decision, as opposed to merely the number of months that have passed during the school year.

1. The Commission considered only those facts necessary for determining whether Appellant Board met its statutory obligation of providing "an annual year-end performance evaluation.

Appellant Board argues that the Commission failed to consider the specific facts underlying is decision to issue the January 23rd evaluation when it did.

Again, this is inconsistent with Appellant Board's prior argument. However, the Commission's Decision did consider the facts and circumstances surrounding the January 23 evaluation. Specifically, the Commission made the following finding with respect to the January 23 evaluation:

> In this case, however, the January evaluation cannot be reasonably construed as complying with the statutory year-end requirement. On January 23, over three months remained before the May 1 notice deadline, and almost half of the district's school year remained.

Decision and Order, p 13.

These were the facts and circumstances that led to the Commission's finding. Merely because the Commission found these facts and circumstances to be more

compelling than any of the excuses offered by Appellant Board *does not* warrant a reversal of the Commission's Decision.

The Commission's application of the law to the facts of this case is not subject to an "abuse of discretion" standard, as Appellant Board seems to be arguing. Rather, in relying on facts from the record which could not be rebutted, and determining that those facts prevented Appellant Board from meeting its obligations under the Act, the Commission's Decision must be said to be supported by competent, material, and substantial evidence.

In support of the assertion that a mid-year evaluation is not adequate to comply with the statute as a matter of law, Ms. Korri would also point out the Court of Appeals' ruling in VanGessel v Lakewood Public Schools, 220 Mich App 37; 558 NW2d 248 (1997). In VanGessel, the Court of Appeals determined a district did not need to provide an individualized development plan to a probationary teacher in their first probationary year. However, the VanGessel Court further held that the purpose of the individualized development plan as set forth in the Tenure Act was "as a tool for promoting professional growth and development," and was "intended to guide a teacher in future actions." VanGessel, at 45.

In Ms. Korri's situation, Appellant Board would not have been obligated to provide an individualized development plan in the first year. If a mid-year evaluation were allowed to serve as the final evaluation in the second year of probation, the growth, development, and guidance purposes of the individualized development plan would be vitiated. Appellant Board's interpretation leaves inadequate time to further those goals.

The interpretation which serves all of the goals of the Act is the interpretation that requires the "annual year-end performance evaluation" to be completed toward the end of the year, not at the end of the first semester or whenever a school board wishes. Thus, Ms. Korri asserts a final evaluation of January 23, or mid-way through the school year, is not "an annual year-end performance evaluation" as required by Section 3a(1) of the Act.

2. *Appellant Board is unable to offer an explanation as to why it failed to follow both the Act's statutory requirements and its own policy surrounding probationary evaluations.*

Even though it has argued within its Application for Leave to Appeal that neither the Commission nor the courts are permitted to inquire into a school board's motives, Appellant Board is still intent on explaining to this Court why it believed Ms. Korri was unsatisfactory. Before being swayed by Appellant Board's passion plea, this Court must be aware of all of the facts and circumstances surrounding the January 23 evaluation.

The testimony adduced at hearing makes clear Appellant Board had a policy of providing probationary teachers three evaluations each year. Consistent with that policy, Ms. Korri received three evaluations in her first year. In her second year, however, Ms. Korri received only two evaluations – November 3, 2000 and January 23, 2001. Ms. Korri was advised that another principal with supervisory responsibility over her, Andy Hongisto, was to do the third evaluation. Principal Hommer admitted she told Ms. Korri that because she had only done two evaluations in 2000-2001, Principal Hongisto was doing the third evaluation. (Tr, p 61.) Consistent with that commitment, Principal Hommer did no further observations of Ms. Korri during the 2000-2001 school year. (Tr, p 62.)

Further, Principal Hommer never advised Ms. Korri that Principal Hongisto was not going to do a third evaluation. (Tr, p 62.) Regardless, Principal Hongisto never got around to the third evaluation (Tr, p 85), even though both Principal Hommer and Principal Hongisto confirmed Principal Hongisto was to do the third evaluation. (Tr, pp 61, 86.) While Principal Hongisto did observe her class on the last day before recommendations of tenure (Tr, p 93), he put nothing in writing. That date, a self-imposed deadline, was *more than one month before* the May 1 deadline. Regardless, no written evaluation was provided.

The record establishes that Appellant Board had a clear policy of providing probationary teachers with three evaluations each year, but did not comply with that policy in Ms. Korri's case. Further, Appellant Board provided Ms. Korri with only two evaluations in the first half of the school year and, consistent with Appellant Board's policy, promised a third evaluation by a different administrator. This evaluation was never provided.

While Ms. Korri acknowledges the Act does not require a certain number of evaluations to take place during each school year, she asserts Appellant Board's failure to follow its own policy in this case is compelling. Appellant Board's deviation from its own policy has led to the present argument that the mid-year evaluation sufficiently served as a "year-end" evaluation. However, it cannot present any reasonable explanation why the mid-year evaluation should be a "year-end" evaluation.

3. Appellant Board's claim of futility does not excuse its failure to comply with the Act's requirements.

Appellant Board further maintains that an evaluation subsequent to the January 23 evaluation would have been futile, given that it had already made up its mind.

While Appellant Board may have provided other evaluations throughout the school year, it *did not* provide the only evaluation that was required under the Act, *i.e.*, "an annual year-end performance evaluation."

The fact that a predisposed school district must wait to give notice to an unsatisfactory probationary teacher does not excuse Appellant Board from its statutory obligation to provide a year-end evaluation. *Any* evaluation will not satisfy this requirement.

Further, Ms. Korri questions how waiting until the proper time for providing a year-end evaluation substantially alters Appellant Board's obligations under the Act. Regardless, the Legislature has stated that they must wait, with the hope of promoting professional growth, development, and guidance.

Simply put, there are no facts which could establish a mid-year evaluation as a "year-end" evaluation, especially one provided on January 23. Appellant Board never conducted the promised third evaluation, which was scheduled to be completed well in advance of May 1. Instead, Appellant Board now attempts to rely on a mid-year evaluation. Appellant Board is apparently asking this Court to excuse its failure to abide by the Act and ignore the clear language of the Act. Excusing Appellant Board's non-compliance in this case would only weaken the goals and purposes of the Tenure Act. In light of the above, the Decision of the Commission is supported by competent, material, and substantial evidence on the whole record and must be affirmed.

E. The Commission's Decision is consistent with the Teacher Tenure Act and does not abrogate any discretion statutorily granted to school districts.

Appellant Board argues that the phrase "year-end performance evaluation" cannot be read literally, because, otherwise, a school district could never provide the 60-day notice required by Section 3 of the Act. Because of the Supreme Court's interpretation of Section 3 in Ajluni, *supra*, Appellant Board correctly states that May 1 is the last date by which a school district must provide notice of unsatisfactory service. However, the conclusive contention that the Commission's Decision is less reasonable than the Preliminary Decision and Order of the Administrative Law Judge is without merit.

While the Administrative Law Judge concluded that "appellee is not obligated to wait until April to issue appellant a year-end evaluation," the Commission disagreed, and interpreted the term "year-end" to require a school district to provide the annual year-end performance evaluation within a reasonable time of the May 1 deadline.

The Commission's view is more reasonable in that it requires all school districts to take the same objective amount of time to fairly evaluate a probationary teacher, rather than providing districts with an avenue to provide a "year-end" evaluation anytime after the 61st day of school. Why would the Legislature require a full school year's worth of probation (minus the 60-day notice period) which could then be so easily side-stepped by districts in such a fashion? The potential for abuse arising from Appellant Board's interpretation makes it less reasonable than the resolution made by the Commission.

Again, this interpretation best gives meaning to the term "year-end" added in the final House Bill (HB 4112). The Commission's interpretation ensures that probationary teachers are provided with the fullest possible period to prove their abilities. To that end,

both the Commission and Court of Appeals properly interpreted the parameters of an "annual year-end performance evaluation."

F. The Commission's Decision is consistent with the Teacher Tenure Act, and will not cause uncertainty or unnecessary costs for Michigan school districts.

In the final portion of its argument, Appellant Board is asking this Court to ignore the Teacher Tenure Act, and a well-reasoned interpretation by the Commission, by raising the specter of uncertainty and costs to Michigan school districts. Ms. Korri asserts, however, that this argument is without merit.

1. The Commission's Decision provides more certainty than the alternative offered by Appellant Board.

As discussed earlier, *supra*, pp 17-18, the Commission's Decision provides both probationary teachers and school boards with more certainty than the theory presented by Appellant Board. Both can anticipate when the evaluation process will be completed, which will allow teachers an objective amount of time in which they can demonstrate their professional growth and development. The Commission's Decision also ensures that school boards will follow an objective procedure before making their subjective decisions on a teacher's performance.

Again, this provides more certainty than the alternative suggested by Appellant Board. According to Appellant Board, the "more certain" interpretation would be to allow school boards to provide "year-end" evaluations at any time during the school year, theoretically, between the 61st day of school and May 1. Such an interpretation provides no certainty.

2. Excessive costs have not been demonstrated.

As for costs, consider Appellant Board's assertion that this is an "issue of first impression under the Act." (Application for Leave to Appeal, p 8.) The section of the Act in question was enacted in 1993 – more than a decade ago. Since that time, probationary teachers across the State of Michigan were obligated to serve four (or two) years of probation and the question of a "year-end" evaluation is one which would occur in each year of their probationary period. Consider the number of teachers added to each district each year for the last eight years and consider the number of school districts in the State. Yet, despite the enormous numbers of teachers who would be subject to the application of this provision, only one case has come before the Commission. All of the other school districts were apparently able to comply with Section 3a(1) of Article II. There is no evidence that the "sky is falling," or of any other "parade of horribles," as presumed by Appellant Board.

Further, Appellant Board argues that, because of the Commission's Decision, the "reasonableness" of the time frames in which school boards provide year-end evaluations is now subject to challenge. However, as discussed earlier in this Brief, the Commission has not added new language to the Act. It has only interpreted what has already been included in Section 3a(1) by the Legislature. In doing so, the Commission has clarified the intention of the Legislature, and given meaning to each and every word included in Section 3a(1). Contrary to Appellant Board's argument, the Commission has not imposed any new standards, nor has it created a new cause of action. Instead, for the first time in eight years, the Commission has addressed an issue and argument that was created once the Legislature included the phrase "year-end" in Section 3a(1). This case

did not become ripe until Appellant Board attempted to substitute a mid-year evaluation as Ms. Korri's year-end evaluation.

3. The Commission's Decision must be given full retroactive application.

Finally, recognizing the futility of its own arguments, Appellant Board contends that the Commission's Decision should not be applied retroactively to the present case in an effort to avoid adhering to the Commission's Decision to reinstate Ms. Korri. This argument has no merit.

First, Appellant Board's reliance on Moorhouse v Ambassador Ins Co, 147 Mich App 412; 383 NW2d 219 (1985), is misplaced. There, the Court of Appeals reiterated the following principles in regards to retroactivity:

> The general rule in Michigan is that decisions of appellate courts are to be given full retroactivity unless limited retroactivity is justified.
>
> The following considerations are pertinent to the issue of whether [a decision] should be given full retroactivity, limited retroactivity, or prospectivity only: (1) the purpose of the new rule, (2) the general reliance upon the old rule, and (3) the effect of full retroactive application of the new rule on the administration of justice.

Moorhouse, at 420-421. (Citations omitted.)

While Moorhouse did note that the retroactive application of a decision may be withheld where it would have a harsh effect because of reliance upon the old rule, *Id* at 421, the facts and circumstances of the present case are entirely different from Moorhouse. There, the Court gave only prospective treatment of a case decided after the cause of action arose in Moorhouse because the new case "announced a new rule of law which

carved a very narrow exception to the well-established rule. . . ." *Id.* As a result, the new rule did not apply to the parties in Moorhouse. This is not the case in the present situation.

Unlike Moorhouse, Appellant Board's plea for prospective treatment is not based upon another court decision rendered during the pendency of the present proceedings. Appellant Board's claim arises in a completely different context. Had another decision been issued while Ms. Korri's tenure proceeding were pending, then the question of retroactivity of *that* decision might arise. However, that is not the case here. In essence, Appellant Board asks that the Commission's Decision not apply to the very case in which it was rendered, but only to those cases coming after it.

Regardless, even if this were a case where the principles of retroactivity were to apply, consider the Court of Appeals' decision in Holmes v Michigan Capital Medical Center, 242 Mich App 703; 620 NW2d 319 (2000). There, the Court of Appeals discussed the application of retroactivity to questions of first impression. Specifically, in determining whether a certain court decision should be retroactively applied to the case at hand, the Holmes Court stated:

> Judicial decisions generally are given full retroactive effect. Prospective application is appropriate, however, when the holding overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed. **That a decision may involve an issue of first impression does not in an of itself justify giving it only prospective application where the decision does not announce a new rule or law or change existing law, but merely provides an interpretation that has not previously been the subject of an appellate court decision.**

Holmes, at 713. (Citations omitted; emphasis added.)

There, the Court allowed retroactive application of the new decision (Scarsella v Pollack, 232 Mich App 61; 591 NW2d 257 (1998), *aff'd* 461 Mich 547; 607 NW2d 711 (2000)), based on the following reasoning:

> Scarsella merely interpreted the clear and unambiguous statutory language that established new, stricter standards for initiating medical malpractice actions. Because Scarsella did not overrule precedent or establish new law, but merely provided a statutory interpretation not previously subject of an appellate court decision, we conclude that the trial court erred in refusing to retroactively apply Scarsella.

Holmes, at 713-714. (Citations omitted.)

This is exactly what the Commission has done in the present case. Therefore, the application of its Decision to the present case is certain.

II. APPELLANT BOARD'S OBLIGATION TO ISSUE A YEAR-END EVALUATION UNDER MCL 38.83a(1) IS NOT EXCUSED BY THE FACT THAT MS. KORRI WAS NOTIFIED THAT HER EMPLOYMENT WAS TERMINATED PURSUANT TO MCL 38.83.

In its Order dated March 11, 2005, this Court requested the parties to also address the issue of whether the fact Ms. Korri was notified that her employment was terminated, pursuant to Section 3 of Article II of the Act, MCL 38.83, affected Appellant Board's obligation to issue a year-end evaluation under Section 3a(1) of Article II of the Act, MCL 38.83a(1). Ms. Korri submits that Appellant Board must issue a year-end evaluation before it may notify her that her employment was being terminated.

Prior to 1993, Section 3a did not exist. A school district's obligation to its probationary teachers with respect to performance was governed solely by the notice requirements of Section 3. Therefore, prior to 1993, a district was required only to provide the probationary teacher with a definite written statement as to whether or not the teacher's

work had been satisfactory. Failure to provide this written statement to the probationary teacher at least 60 days before the close of school year served as conclusive evidence that the teacher's work was satisfactory. Conversely, if the proper notice was given, the teacher's services were discontinued at the end of the school year, and the teacher could not challenge, through tenure process, the reasons for his or her dismissal.

The requirements of Section 3 remain in effect today. However, with the 1993 amendments to the Tenure Act, 1993 PA 59 and 1993 PA 60, additional obligations were imposed on school districts with respect to evaluating the performance of their probationary teachers. Through the 1993 amendments, Section 3a was created. As a result, the Legislature now required school districts to, *inter alia*, provide a probationary teacher with at least "an annual year-end performance evaluation." This new requirement, set forth in Section 3a(1), supersedes a district's prior ability to simply provide the teacher with written notice of unsatisfactory performance 60 days prior to the close of the school year. Now, a school district must comply with the evaluation requirements of Section 3a(1) before it can provide notice of unsatisfactory performance to the probationary teacher.

This concept is made clear through Section 3a(2). According to Section 3a(2), "Failure of a school district to comply with [Section 3a(1)] with respect to an individual teacher in a particular school year is conclusive evidence that the teacher's performance for that school year was satisfactory." MCL 38.83a(2). Just as a district's failure to provide the required 60-day notice under Section 3 is conclusive proof that the teacher's work is satisfactory, so, too, is a district's failure to perform an annual "year-end" performance evaluation of the teacher conclusive proof of satisfactory performance.

Because of the 1993 amendments, the relationship between Section 3 and Section 3a is now one of dependence. In order to provide written notice of unsatisfactory performance under Section 3, a school district must have provided the teacher with at least an annual year-end performance evaluation under Section 3a(1). If the district fails to meet this requirement of Section 3a(1), then Section 3a(2) operates to establish conclusive evidence that the teacher's performance is satisfactory. Therefore, board action taken under Section 3 is interdependent on the school district fulfilling its obligations under Section 3a(1).

The practical effect of Section 3a(2) is that a district cannot provide a probationary teacher with written notice of unsatisfactory performance without first providing the teacher with at least an annual year-end performance evaluation. To permit a school district to give the 60-day written notice of its intention to terminate the teacher's services without providing a year-end evaluation would render the provisions of Section 3a(1) and (2) nugatory. Were this Court to excuse Appellant Board's failure to perform a "year-end" performance evaluation of Ms. Korri under Section 3a(1), simply because Appellant Board provided her with notice of termination under Section 3, the Court will have effectively deleted the Legislature's inclusion of Section 3a into the Tenure Act.

With this foundation, the decisions of both the Commission and Court of Appeals were proper interpretations of the Tenure Act. Section 3 and Section 3a are *in pari materia*, and interpreting Section 3a to require the "annual year-end performance evaluation" to be provide within a reasonable time of the May 1 deadline established as a result of the 60-day notice provision of Section 3 is supported by competent, material and substantial evidence. Appellant Board's Application for Leave to Appeal must be denied.

CONCLUSION

The Commission's Decision and Order, as well as this appeal, go well beyond both Susan Korri and the Norway-Vulcan Area Schools Board of Education. The decision in this case will effect the evaluation of every probationary teacher throughout the State. This is exactly why this Court must not be swayed by Appellant Board's subjective beliefs as to Ms. Korri's performance. Rather, this Court must focus on the *legal* issue at hand, not the *factual* issues upon which Appellant Board would prefer this Court render a decision. The Court of Appeals was not swayed, nor should this Court.

Appellant Board failed to live up to its obligations under the Teacher Tenure Act and its own policies. Rather than owning up to its own failure, Appellant Board pleads with this Court to ignore the Teacher Tenure Act; ignore its violation of its own policies on evaluation; and ignore the judicial standard of review applied to Commission decisions.

Section 3a(1) of Article II clearly states that a school board is required to provide each probationary teacher "an annual year-end performance evaluation." The arguments set forth by Ms. Korri in this Brief establish that the Commission properly interpreted the Legislature's intentional inclusion of the phrase "year-end" in Section 3a(1). In determining that Appellant Board's mid-year evaluation did not meet the requirements of the Act's evaluation procedures, the Commission relied on facts and circumstances presented in the record. As a result, it must be said that the Commission's Decision and Order was supported by competent, material and substantial evidence. The Court of Appeals affirmed, and so, too, must this Honorable Court.

RELIEF

WHEREFORE, Appellee, Susan Korri, respectfully requests that this Court deny Appellant Board's Application for Leave to Appeal and affirm the Decision and Order of the State Tenure Commission.

Respectfully submitted,

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